Office - Supreme Court, U. S.
FILED
FEB 17 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 723

H. C. JORDAN and ROSS WALKER, *Petitioners*,

VS.

G. V. FISHER, FRANCES AMBROSE LAW, HAROLD WARD LAW and HONOLULU OIL CORPORATION, *Respondents*,

AND

H. C. JORDAN and ROSS WALKER, *Petitioners*,

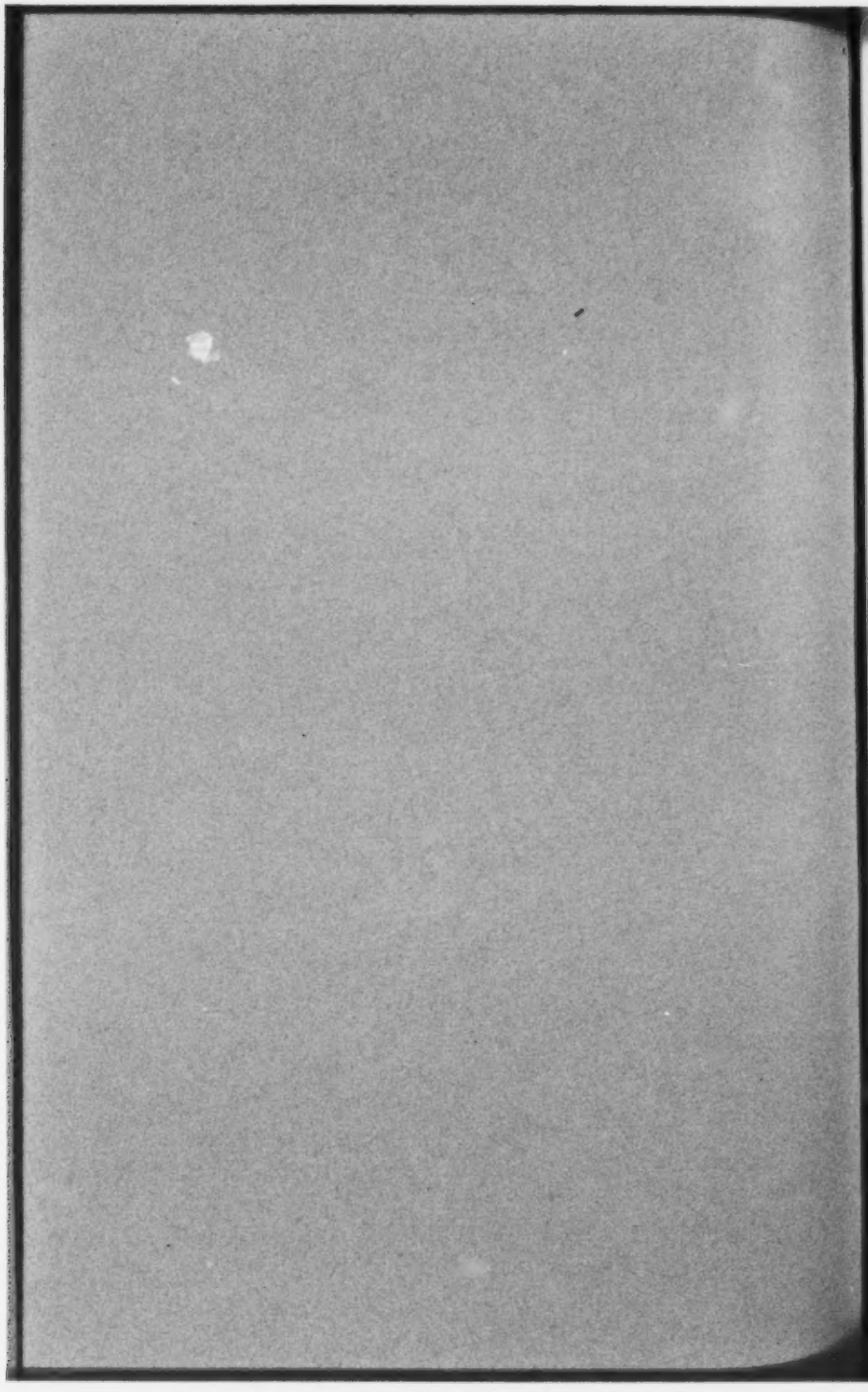
VS.

G. V. FISHER and HONOLULU OIL CORPORATION, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

FRANK STUBBEMAN,
Midland, Texas,
WARREN SCARBOROUGH,
Fort Worth, Texas,
ALFRED MCKNIGHT,
Fort Worth, Texas,
Attorneys for Respondents.

Commercial Recorder—Fort Worth, Texas—2-4896



INDEX

Pages

Supplemental Statement of the Case 2-5

There are no special or important reasons as contemplated by Rule 38 5-10

There is no basis for invoking jurisdiction of the Supreme Court.

I. Suit involving the 120 acre tract and the collateral attack on the Attachment Judgment 11-23

1. The only Circuit Court decision with which conflict is claimed is one which was reversed by this Court 11-17

2. No conflict with statutes or decisions of Texas 17-23

II. The suit involving the 200 acre tract and the collateral attack on the Divorce Decree and the Judgment of 1928 23-35

1. The collateral attack on the Judgment of 1928 23-29

2. The collateral attack on the Divorce Decree 29-35

III. Respondents were bona fide purchasers for value 35-39

IV. The Petitioners had ratified the lease to Honolulu and the title of Fisher 39-41

Conclusion 42-43

INDEX OF AUTHORITIES

Abramson v. Sullivan, 103 S. W. (2d) 229	29
American Surety Co. v. S. L. & S. Co., 180 S. W. 101	22
Article 4638 (R. C. S.)	9
Askew v. Rountree, 120 S. W. (2d) 117	33
Avant v. Broun, 91 S. W. (2d) 426	18
Aucutt v. Aucutt, 63 S. W. (2d) 755	30
Ballard v. Hunter, 204 U. S. 241, 51 L. Ed. 461	11
Bearden v. Texas Co., 41 S. W. (2d) 447	24
Bird v. Palmetto Lumber Co., 176 S. W. 610	33

INDEX OF AUTHORITIES—Continued

	Pages
Bull v. Campbell, 225 Fed. 923	12
Cain v. Hopkins, 141 S. W. 834	8
Carpenter v. Anderson, 77 S. W. 291	36
Chapman v. Kellogg, 252 S. W. 151	17
Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 84 L. Ed. 196	33, 39
Cline v. Niblo, 8 S. W. (2d) 633	9
Cooper v. Reynolds, 77 U. S. 308, 19 L. Ed. 931	10, 14, 16, 23
Corpus Juris., Volume 66, page 1107, sec. 931	38
Crow v. Van Ness, 232 S. W. 539	36
Cuilla v. Cuilla, 253 S. W. 643	30
Dean v. Dean, 165 S. W. 90	36
Dunlap v. Green, 60 Fed. 242	39
Empire Fuel & Gas Co. v. Albright, 87 S. W. (2d) 1092	17
Erie Railway Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188	33, 39
Fitts v. Fitts, 14 Tex. 443	29
Freeman on Judgments (5th Edition), Sec. 365	24
Galloway v. State National Bank of Fort Worth, 56 S. W. 236	18
Gibbens v. Bourland, 145 S. W. 274	24
Grissom v. Anderson, 79 S. W. (2d) 619	41
Gulf & T. & W. Ry. Co. v. Lunn, 141 S. W. 538	24
Hart v. Hunter, 114 S. W. 882	24
Hayward v. Hayward, 53 S. W. (2d) 108	29
Hedtke v. Hedtke, 248 S. W. 21	30
Honea v. Arledge, 120 S. W. 508	28
Humble Oil & Refining Co. v. Clark, 87 S. W. (2d) 471	41
Hunter v. Johnson, 209 U. S. 541, 52 L. Ed. 918	11
Iams v. Root, 55 S. W. 411	18
Johnson v. Hunter, 147 Fed. 133	11
Jones v. Siler, 129 Tex. 18, 100 S. W. (2d) 352	28
Lessee of Clymer v. Dawkins, 3 How. 674, 11 L. Ed. 778	28
Lessees of Robert Grignon et al. v. John J. Astor et al., 2 How. 319, 11 L. Ed. 282	21

INDEX OF AUTHORITIES—Continued

	Pages
Long v. Long, 69 S. W. 428	30
Loper v. Meshaw Lumber Co., 104 S. W. (2d) 597	18
McLane v. Kirby & Smith, 116 S. W. 118	29
Mariposa Mining Co. v. Waters, 279 S. W. 576	17
Martin v. Burns, 16 S. W. 1072	17
Mendlovitz v. Samuels Shoe Co., 5 S. W. (2d) 559	21
Mitchell v. Simms, 63 S. W. (2d) 371	41
Moore v. Knight, 127 Tex. 610, 94 S. W. (2d) 1137	28
Parker v. Scobee, 36 S. W. (2d) 303	9
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565	12, 13, 14
Production Co. v. Lee, 132 Tex. 254, 121 S. W. (2d) 973	28
Reasonover v. Reasonover, 59 S. W. (2d) 887	30
Red River National Bank v. Latimer, 110 S. W. (2d) 232	39
Reynolds v. Volunteer State Life Insurance Co., 80 S. W. (2d) 1087	17
R. C. L. 27, page 699	39
Scannell v. Scannell, 117 S. W. (2d) 538	31
Schaeffer v. Williams, 208 S. W. 220	24
Scott v. Bank, 124 S. W. (2d) 356	9, 31
Sederholm v. City of Port Arthur, 3 S. W. (2d) 925 (C. C. A.)	24
Seefeld v. Duffer, 179 Fed. 214, 220 U. S. 616	13
Simons v. Simons, 23 Tex. 344	30
Smith v. Smith, 91 S. W. 815	30
Snell v. Knowles, 87 S. W. (2d) 871	36
Stark v. Sims, 230 Fed. 115	13
Stegall v. Huff, 54 Tex. 193	8
Stephenson v. Kirtley, 269 U. S. 136, 70 L. Ed. 213	10, 14, 16, 23
Stoneman v. Bilby, 96 S. W. 50	8
Stuart v. Anderson, 8 S. W. 295	21
Switzer v. Smith, 300 S. W. 31	8, 19
Tanton v. State National Bank of El Paso, 43 S. W. (2d) 957	24, 25
Texas Constitution, Article 5, Sec. 16	9
Texas Juris., Vol. 11, page 721	9
Texas Juris., Vol. 25, Secs. 329, 330, page 856	17, 18

INDEX OF AUTHORITIES—Continued

	Pages
Texas Juris., Vol. 25, page 412	29
Texas Juris., Vol. 43, page 636	38
T. P. Coal & Oil Co. v. Kirtley, 288 S. W. 619	41
Tiemann v. Tiemann, 34 Tex. 523	30
Tobin v. Benson, 152 S. W. 642	38
Treadway v. Eastburn, 57 Tex. 209	17
Trimble v. Trimble, 15 Tex. 19	30
Turner v. Hunt, 116 S. W. (2d) 688	41
Van Deventer v. Gulf Production Co., 41 S. W. (2d) 1029	41
Weems v. Masterson, 80 Tex. 45, 15 S. W. 590	24, 25
Williams v. Ball, 52 Tex. 603	9
Williams v. Young, 90 S. W. 940	36
Young v. Young, 127 S. W. 898, 23 S. W. 83	8, 20, 30
Yount v. Fagin, 244 S. W. 1036	36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 723

H. C. JORDAN and ROSS WALKER, *Petitioners*,

VS.

G. V. FISHER, FRANCES AMBROSE LAW, HAROLD WARD LAW and HONOLULU OIL CORPORATION, *Respondents*,

AND

H. C. JORDAN and ROSS WALKER, *Petitioners*,

VS.

G. V. FISHER and HONOLULU OIL CORPORATION, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Writ of certiorari to review the above causes should be denied, and in opposition to the petition for such writ, respondents, G. V. Fisher, Frances Ambrose Law, Harold Ward Law and Honolulu Oil Corporation, submit the following:

OPINIONS OF THE COURT BELOW

The opinion rendered by the 5th Circuit on December 18, 1940 is reported in 116 F. (2d) 183, and the opinion of the District Court, which was reversed by the Circuit Court, is reported in 32 Fed. Sup. 608.

SUPPLEMENTAL STATEMENT OF THE CASE

This record embraces two suits, one instituted by all of the Respondents as plaintiffs, and the other by Respondents, Fisher and Honolulu Oil Corporation only as plaintiffs, and both against Petitioners as defendants, as actions in trespass to try title and to remove cloud from title with respect to two separate tracts of land, one consisting of 120 acres and the other of 200 acres, both tracts being located in Yoakum County, Texas (Bill of Complaint in the first case R.3-9, and in the second case R.43-49). Although not consolidated, the cases were tried together and only one record on appeal was made (R.1,2). It was conceded that H. C. Jordan, one of the Petitioners, and his wife, Ethel Hall Jordan (subsequently divorced from him and not a party to either suit) acquired both tracts of land as community property from the State of Texas on August 19, 1908, at an agreed price to be later paid of $6.51 per acre (R.68-69). It was also conceded, and found and held by the trial court, that the former wife's one-half community interest in the two tracts of land had by regular chain of title passed to and become vested in the Respondents, so that the suits in reality involved only the husband's one-half interest therein.

The Petitioners by pleading (R.10) collaterally attacked, in the suit involving the 120 acres, a judgment of the County Court of Scurry County, Texas, referred to in the Circuit Court of Appeals' opinion as "The Attachment Judgment," which was rendered on July 10, 1913, in a suit styled W. E. Head versus H. C. Jordan and J. B. Jordan (the latter being the father of the Petitioner, H. C. Jordan). This judgment is found in the record 70-72. The 120 acres in question were duly, legally and in strict compliance with all statutory requirements attached, and pursuant to the aforementioned judgment, the attachment lien was foreclosed, the property sold and Jordan's title and interest in said land by regular chain of title passed to Respondents.

During the more than tweny-five years intervening between the sale and the filing for record of a quit claim deed from Petitioner, H. C. Jordan, to Petitioner, Ross Walker, on February 2, 1939, the record does not reflect that Respondents' title under such sale was ever questioned or clouded, and at about that time the testimony shows that Ross Walker wrote to Respondent, Fisher, for the purpose of attempting to buy a part of the mineral royalty under a part of the land in question, and in connection with such purchase borrowed and examined an abstract of title thereto (R. 260-262), and although Walker wrote back to Fisher on January 26, 1939, "* * * I had my attorney to examine the abstract and he finds the title in you is all right without objections" (R. 262), and actually purchased such royalty interest, nevertheless five days later Walker obtained a quit claim deed from the other

Petitioner, Jordan, for his alleged one-half interest in the 120 acres in question, and thus for the first time of record in more than twenty-five years there was even any apparent cloud cast upon the Respondents' title under the aforementioned judgment and sheriff's sale.

Petitioners also by pleading (R.50) collaterally attacked two other State Court judgments, one by the District Court of Scurry County, Texas, rendered on September 19, 1916, (referred to by the Circuit Court as "The Divorce Decree"), and the other rendered by the District Court of Yoakum County on June 5, 1928 (referred to by the Circuit Court as "The Judgment of 1928"), both of which judgments divested the Petitioners of title to the 200 acre tract and vested the same in the predecessors in title of the Respondents. Petitioners here, as in the courts below, wholly fail to differentiate between a collateral attack upon a prior judgment and a direct attack between the same parties and in the forum which rendered such prior judgment.

By supplemental pleading Respondents contended that they were bona fide purchasers for value without notice of any of the alleged defects in any of the three judgments, and that since said judgments were all regular upon their face and contained due recitations and findings which showed them to be valid, that they were entitled to recover, notwithstanding Petitioners' attacks upon such judgments. (R.16-56). Respondents also contended that the Petitioners had ratified and confirmed their respective titles, and in this connection particularly the claim of Respondent, Hono-

lulu Oil Corporation was based upon the fact that Petitioner Walker, had purchased and acquired a mineral royalty interest under the 200 acre tract by an instrument which expressly provided that said land was subject to an oil and gas lease in favor of Honolulu Oil Corporation and "* * * it is understood and agreed that this sale is made subject to the terms of said lease * * *" (R.255). Neither the question of bona fide purchaser for value nor of ratification were discussed or disposed of by the Circuit Court of Appeals, because of the fact that under its decision holding the judgments not subject to collateral attack the consideration of these questions was not necessary. However, Respondents here urge such propositions in support of the judgment of the Circuit Court in reversing the judgment of the District Court, which propositions will be hereinafter more fully discussed.

THERE ARE NO SPECIAL AND IMPORTANT REASONS AS CONTEMPLATED BY RULE 38 WHICH WOULD WARRANT A REVIEW BY THIS COURT ON WRIT OF CERTIORARI.

All three of the prior state judgments involved in these two collateral attacks are concededly valid upon their face. They were each rendered many years prior to the attack made upon them in these proceedings by state courts of Texas of competent and general jurisdiction. They each upon their face show that the court was rendering a judgment in connection with a controversy which was within the potential jurisdiction of the court. They each recite and find due issuance and service of process upon the Petitioner Jor-

dan, the defendant in each of said judgments. In each instance the Petitioners have sought to contradict and impeach the apparent validity of such judgments by resort to other parts of the respective records. Petitioners now seek to invoke the jurisdiction of this Court by petitioning for writ of certiorari principally upon the assertion of a conflict between the holding of the Circuit Court and the State Courts of Texas with respect to certain decisions. In subsequent parts of this brief we demonstrate as briefly and as concisely as possible that there is no conflict between the holding of the Circuit Court and the decisions of Texas with respect to each of the material points involved. While emphatically and as urgently as possible denying conflict, we call to the Court's attention that even the conflicts alleged are not conflicts with respect to important cases of local law, such as are contemplated by Rule 38.

In this case, as well as in any other cases relating to an attack upon a prior judgment, the decision must ultimately depend upon the facts and circumstances in each case. For instance, the scope of review in a collateral attack is much more limited than upon a direct attack. A different rule is applicable where the judgment contains recitations or findings with respect to jurisdictional facts from that which applies when the judgment is either silent or when the defect affirmatively appears upon the face of the judgment. Similarly, when the judgment is not in personem but undertakes to deal with a specific res and it appears that such res has been attached or otherwise duly seized by process of the court actually or constructively, any

irregularities with respect to prior steps taken in the proceeding are not subject to review when the attack is collateral. In veiw of these and other factors, a decision in a case of this character necessarily is limited to the particular and peculiar facts and circumstances involved.

Even a cursory examination of the Petitioners' application and the authorities cited will disclose an apparent disregard of these distinctions. They indiscriminately cite to this Court and claim conflicts with prior decisions involving direct attacks, whereas the attack here is collateral. They urge before this Court decisions of Texas dealing with collateral attacks upon judgments which upon their face affirmatively show the defects complained of; whereas in this case each of the judgments are valid upon their face and affirmatively show both potential and actual jurisdiction, and it is only by an attempted resort to other parts of the proceedings in such prior cases that the alleged defects can be presented.

Petitioners likewise claim conflicts with Texas decisions where the question involved was one of potential jurisdiction of the Court over the character of controversy presented, which obviously have no application here. Petitioners also present authorities from the State Courts of Texas which do not represent the present holding of the Texas Courts, and even urge as one ground of conflict a Circuit Court decision from the Eighth Circuit to which this Court granted writ of certiorari and which was subsequently reversed by this Court.

An examination of the cases cited by Petitioners will show that such cases involve situations falling into one of four classes: (1) Such as *Young v. Young*, supra, where the attack was by appeal, or similar cases where the attack was a direct attack; (2) cases where the judgment complained of contains no recitals of due and legal service of citation, in which instance, of course, the entire record can be looked to. Such a case is *Stegall v. Huff*, in which the judgment under attack was from a Justice Court which is not a court of record. The opinion does not quote the judgment and we are not advised of what recitations were contained in the judgment; however, the court points out that it *affirmatively* appeared that the judgment was rendered upon a citation not authorized by statute. The Supreme Court on numerous occasions has said that since *Treadway v. Eastburn*, 57 Tex. 209, which was decided after *Stegall v. Huff*, that it had been the uniform holding of the Courts of Texas that "as against a collateral attack the recitations of due service in a judgment proper is conclusive upon such matter and may not be contradicted by other facts whether appearing in the record or aliunde. Such recitations import absolute verity." (*Switzer v. Smith*, post, page 19); (3) cases dealing with the Justice Court judgments holding that evidence dehors the record is admissible, and this is true because the Justice Court in Texas is not a court of record. For instance, in *Stoneman v. Bilby*, 96 S.W. 50, it appeared "the judgment does not recite the filing of an affidavit or service upon the defendant." Likewise, in *Cain v. Hopkins*, 141 S.W. 834, the judgment was silent as to the jurisdictional question; (4) cases involving a collateral at-

tack upon the judgment of a court of limited jurisdiction, or cases where the court has no potential jurisdiction of the subject matter of the suit, such as *Cline v. Niblo*, 8 S.W. (2d) 633, in which the question of jurisdiction involved a homestead question. None of such cases has any application here because County Courts in Texas are constitutionally created courts and have general and exclusive jurisdiction in all civil cases when the matter in controversy exceeds $200 and does not exceed $500, *Texas Constitution, Article 5, Section 16; Williams v. Ball*, 52 Tex. 603; *Texas Jur., Vol. 11, page 721.* In *Parker v. Scobee*, 36 S.W. (2d) 303, another of the cases relied on by Petitioners, there was involved a direct appeal and not a collateral attack.

In the numerous authorities relied upon by Petitioners with respect to the Divorce Decree, none of them deal with a collateral attack upon a judgment such as we have here involved. Many of the cases, such as *Scott v. Bond* (cited by Petitioners as Scott v. Bank) involved merely a question of venue and this by direct appeal. It did not involve a prior divorce judgment, nor did it involve a situation as we have here where the court, in addition to granting the divorce, was called upon to make provision for minor children. As pointed out in the Texas case of *Scott v. Bank* (post, page 31) notwithstanding the provision of *Article 4638*, the Court had the power to award the wife "a lump sum in property for the maintenance of the child * * *".

None of the Texas cases cited by Petitioners with respect to the alleged defect in the affidavit upon which

they claim the citation was issued in the attachment suit involve a situation where the jurisdiction of the court was based also upon a valid attachment. In the case at bar it was conceded that the attachment was duly issued and levied and no attempt was made to impeach or contradict the express recitations and findings in the judgment with respect to such attachment. Consequently, as held by the Circuit Court, the rule of this Court as announced in *Cooper v. Reynolds* and *Stephenson v. Kirtley* is applicable and there is necessarily no conflict between such decision and any of the decisions cited by Petitoners.

None of the cases cited by Petitioners with respect to the 1928 Judgment are in conflict with the holding that even though the petition be subject to general demurrer, such fact is not a ground upon collateral attack for setting aside the judgment. The Petitioners seek to show that the petition was subject to general demurrer, but any conflict in that respect would be immaterial because under the law in Texas, even if it be subject to general demurrer, Petitioners could not avail themselves of that fact in this, a collateral attack.

At the risk of unduly prolonging this brief, we consider first the decisions of the Texas Courts relating to the issue actually decided in connection with the 120 acre tract, and then the decisions relating to the 200 acre tract, and in each instance the authorities cited and reviewed demonstrate that there is no conflict between the approved and recognized holding of the Texas Courts and that of the Circuit Court in the case at bar.

I. THE SUIT INVOLVING THE 120 ACRE TRACT AND THE COLLATERAL ATTACK ON THE ATTACHMENT JUDGMENT.

There is no Basis for Invoking Jurisdiction of the Supreme Court.

1. THE ONLY CIRCUIT COURT DECISION WITH WHICH CONFLICT IS CLAIMED IS ONE WHICH WAS REVERSED BY THIS COURT.

The only conflict alleged with any Federal Court decision is with respect to *Johnson v. Hunter*, 147 Fed. 133, by the 8th Circuit Court of Appeals. Upon writ of certiorari the Supreme Court reversed this case; *Hunter v. Johnson*, 209 U. S. 541, 52 L. Ed. 918. The reversal, as shown by memorandum opinion, was based upon *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461.

Under the rule laid down in Ballard v. Hunter, Petitioner Jordan could not challenge the sufficiency of the affidavit upon which citation was issued, because he was in fact a nonresident of the State of Texas at the time such affidavit was construed as sufficient by the court rendering the judgment in question and because at the time a due and regular citation was **actually issued and published** according to the statutes. Mr. Justice McKenna in that case stated in part as follows:

> "Plaintiffs in error, it is true, allege that no 'sufficient affidavit of the plaintiff' was filed 'stating positively or sufficiently any one of the facts' required to be stated, and that the clerk did not make, on the complaint or otherwise, any

warning order to plaintiffs in error, or to either of them, to appear in the suit as required, or which obliged them to appear therein or bound them by the proceedings which were had therein. But there was no allegation that either of them was in the county or that there was an occupant upon their lands. *Not being defendants who were entitled to personal service, they cannot urge against the decree that they were not given personal service, or complain that the complaint was insufficient as an affidavit for service by publication, because it did not deny the existence of conditions which there is no pretense existed.*"

This holding supports the reasoning of Judge Sibley in the case at bar wherein he said:

> "It thus appears that the clerk thought and the judge decided that 'whereabouts' was the equivalent of 'residence.' Right or wrong, no substantial injury was done Jordan. He was in fact outside the State and not servable personally, and his residence there was unknown. The object of the published citation was to give him notice, and the citation as issued and published was exactly what the statute prescribed and what it would have been if the affidavit had used the correct word."

On the other hand, the holding in the case at bar is in accord with the rule of the 8th Circuit as announced in the case of *Bull v. Campbell*, 225 Fed. 923 (certiorari denied) in which a state court judgment of foreclosure was attacked in the federal court upon the ground, among others, that the affidavit upon which the citation of publication was had was defective. The court followed the holding of the majority in *Pennoyer v.*

Neff and held that a defect in the affidavit would not render the judgment absolutely void so that it could be attacked in a collateral proceeding. The court stated:

> "It may be conceded that, upon an appeal from a decree rendered upon such an affidavit, it would be declared insufficient to warrant an order of the court for substituted service, a question not before us, and therefore not determined; but it would not follow that a decree based upon such an affidavit and order would make the decree absolutely void, so that it could be attacked in a collateral proceeding. No authority has been called to our attention in the very elaborate brief of counsel for defendant, nor in the oral argument, to any decision of the Supreme Court of the territory of Dakota, or the state of North Dakota, where such a judgment or decree has been declared void when collaterally attacked, nor have we been able to find any such authority. The court which acted on the affidavit held it sufficient, and if it erred the error could only be corrected by appeal. The decree cannot be attacked collaterally. Applegate v. Mining Co., 117 U. S. 225, 6 Sup. Ct. 742, 29 L. Ed. 892; Pennoyer v. Neff, 95 U. S. 714, 721, 24 L. Ed. 565."

The decision in the case at bar also followed prior holdings of the 5th Circuit; *Seefeld v. Duffer*, 179 Fed. 214, certiorari denied 220 U. S. 616; *Stark v. Sims*, 230 Fed. 115. In *Stark v. Sims* the Fifth Circuit had before it another attempt, long years after a state court judgment was rendered, to collaterally attack it. The judgment recited: "*And it appearing to the satisfaction of the court that there has been regular*

service of process upon said defendant," the court held that such judgment was not subject to attack upon the ground that no valid service had been had upon the defendant, even though the only record in the state court of an attempt to obtain service was "*an ineffective attempt to get jurisdiction by publication.*" Judge Walker, writing the opinion for the court, stated:

> "The fact that the file in the case, as it was found more than half a century after the case was disposed of, shows that there was an ineffective attempt to get jurisdiction by publication, does not prove the absence of personal service of process upon the defendant. After the lapse of more than 50 years since the rendition of that judgment *almost any fact essential to support the regularity and validity of the judgment and of the title acquired thereunder is to be presumed,* certainly when the indulgence of such presumption involves no contradiction of the recitals of the judgment. Baeder v. Jennings (C.C.A.) 40 Fed. 199, 217; Duncan v. Williams, 89 Ala. 341, 350, 7 South. 416; Voorhees v. United States Bank, 10 Pet. 449, 9 L. Ed. 490; 16 Cyc. 1075; 2 Chamberlayne's Modern Law of Evidence, pp. 1199, 1200."

Because of the fact that the property in question had been legally seized under a validly issued writ of attachment concerning which there was no complaint, the decision follows the long recognized and well-established rule of this court as announced in *Cooper v. Reynolds,* 77 U. S. 308, 19 L. Ed. 931; *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565; *Stephenson v. Kirtley,* 269 U. S. 136, 70 L. Ed. 213.

In *Cooper v. Reynolds* it appeared that Cooper had

sued Reynolds in the state court of Tennessee in an action in trespass to try title and had a writ of attachment issued and levied upon the land in question. The case proceeded to judgment, the land was sold and Cooper went into possession thereof. Reynolds then brought an ejectment in the United States Circuit Court for the Eastern District of Tennessee. He collaterally attacked the judgment of the Tennessee court upon the ground that the affidavit upon which the attachment was issued was defective, and upon the ground that there was no publication of notice as required by the statutes of Tennessee.

The Supreme Court upheld the judgment of the Tennessee State Court and in doing so held (1) that it was not called upon to rule upon any errors, no matter how apparent, which had been made by the Tennessee Court "unless they be such as prove that the court had no jurisdiction of the case"; (2) where there is a writ of attachment and levy upon property within the state "it seems to us that the seizure of the property or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem. Without this the court can proceed no further. With it the court can proceed to subject that property to the demand of the plaintiff"; (3) that the actual issuance and service of the writ of attachment and the seizure of the property is the controlling fact and any irregularities in the preliminary affidavit are not of such nature as would authorize the federal court to hold that the judgment was absolutely void as distinguished from voidable.

In the case at bar there was admittedly a valid affidavit and bond for the issuance of a writ of attachment. The statute authorized such writ. It was duly and legally levied, recorded and indexed.

In *Stephenson v. Kirtley*, 269 U. S. 163, 70 L. Ed. 213, the court reaffirmed the holding of *Cooper v. Reynolds*. The land involved was situated in West Virginia. Stephenson and the other plaintiffs claiming under him sought to set aside a judgment of the state court holding that the deeds from Stephenson to his co-plaintiffs were fraudulent. The state court assumed to exercise jurisdiction by virtue of an attachment and citation by publication. The deeds were set aside and the land sold in satisfaction of the claim against Stephenson and was bought in by Kirtley. The bill in the federal court alleged that Stephenson and the other plaintiffs had no knowldege of these proceedings until after the time for reviewing them in the state court had expired, and that such proceedings were void because the affidavit upon which the attachment was issued did not comply with the West Virginia statute and because the order directing publication of notice of citation was defective and not in compliance with the West Virginia statute. The Supreme Court affirmed a decree of the District Court dismissing the bill and upholding the state court's judgment. With reference to the attack upon the attachment proceedings the court was of the opinion that the affidavit for attachment was sufficient, but stated:

> *"Furthermore, where a writ of attachment has been issued and levied, the preliminary affidavit has served its purpose, and even though it be de-*

fective and an appellate court might find in it sufficient error to reverse the judgment, this does not deprive the court of the jurisdiction acquired by the levy of the writ. Cooper v. Reynolds, 10 Wall. 308, 319, 19 L. Ed. 931, 933; Ludlow v. Ramsey, 11 Wall. 581, 588, 20 L. Ed. 216, 218; Miller v. White, 46 W. Va. 67, 71, 76 Am. St. Rep. 791, 33 S.E. 332; McIntosh v. Augusta Oil Co., 47 W. Va. 832, 837, 35 S.E. 860."

The Court likewise followed the well recognized rule that a recitation in the judgment itself was conclusive.

2. NO CONFLICT WITH STATUTES OR DECISIONS OF TEXAS.

(1) Under the well recognized rule in Texas, the recitations and findings in the Attachment Judgment (R. 70) to the effect that Jordan had been duly and legally cited to appear in the case, import absolute verity and are conclusive upon collateral attack upon the issue of jurisdiction of the court over the attached property.

25 Tex. Jur., Section 329, 330, page 856, etc.;
Treadway v. Eastburn, 57 Tex. 209;
Martin v. Burns (Tex. Sup.) 16 S.W. 1072;
Chapman v. Kellogg (Com. of App.), 252 S.W. 151;
Empire Fuel & Gas Co. v. Albright (Com. of App.), 87 S.W. (2d) 1092;
Mariposa Mining Co. v. Waters, 279 S.W. 576;
Reynolds v. Volunteer State Life Ins. Co., 80 S.W. (2d) 1087 (writ of error refused);

Avant v. Broun, 91 S. W. (2d) 426 (writ of error dismissed);

Iams v. Root, 55 S.W. 411 (writ of error refused);

Galloway v. State Nat'l Bank of Fort Worth, 56 S.W. 236 (writ of error denied);

Loper v. Meshaw Lumber Co., 104 S.W. (2d) 597 (writ of error denied).

The rule is clearly stated in *Tex. Jur.*, Vol. 25, page 856, as follows:

"329. Recitals Generally.—It is the right and duty of a court entertaining a controversy to determine whether or not it has jurisdiction; and while a judgment will not necessarily be regarded as void merely because the court did not recite its finding on this issue, the presence or absence of such a recital may, as we have seen, be determinative of its validity on a collateral attack. A recital of this kind need not enumerate all of the matters found as a basis for the finding that the court had jurisdiction. On the contrary, a general statement of the main fact upon which determination was made will usually suffice. * * *"

"330. Conclusiveness of Proper Recitals.—*A clear and definite recital of jurisdictional findings imports absolute verity, and, according to the weight of authority, is conclusive of the issue of jurisdiction; and no evidence of any kind—not even the remainder of the record*—will be received in contradiction thereof, even though such evidence would demonstrate that jurisdiction was not in fact acquired. In other words, a judgment that contains recitals of this character is not void, but merely voidable, and is subject to attack only

by means of a direct proceeding instituted for that purpose. It is invulnerable to collateral attack, no matter how invalid it may be.

"The rule is based on public policy. Its main purpose is to protect solemn judgments from indefinite suspicion and unwarranted attack. While, as has been observed, consequences almost calamitous at times follow its application, our courts have expressed the conviction that such occasional hardship is preferable to permitting the destruction of confidence in their judgments, a result which would inevitably follow the adoption of any other rule."

In *Switzer v. Smith* (Com. of App.), 300 S.W. 31, in a case involving a collateral attack upon a judgment based upon improper service of citation and in which the judgment itself recited:

" 'On this 17th day of February, 1915, came the plaintiff by attorney and the defendant though duly cited failed to appear and answer in this behalf, but wholly made default;"

and with reference to which the court stated as follows:

"Since Treadway v. Eastburn, 57 Tex. 209, it has been the uniform holding of the courts in this state that, as against a collateral attack, the recitation of due service in the judgment proper is conclusive upon such matter, and may not be contradicted by other facts, whether appearing in the record or aliunde. Such recitation imports absolute verity. Martin v. Burns, 80 Tex. 676, 16 S.W. 1072; Gibbs v. Scales, 54 Tex. Civ. App. 96, 118 S.W. 188 (writ refused); Chapman v.

Kellogg (Tex. Com. App.), 252 S.W. 151; Borders v. Highsmith (Tex. Civ. App.), 252 S.W. 270; Mariposa Mining Co. v. Waters (Tex. Civ. App.), 279 S.W. 576; Gillette's Estate v. State (Tex. Civ. App.), 286, S.W. 261; Barton v. Montex Corp. (Tex. Civ. App.), 295 S.W. 950."

(2) Petitioners contend that there is a conflict between the opinion of the Circuit Court of Appeals and the holding of a Texas Court of Civil Appeals in *Young v. Young*, 127 S.W. 898. This contention is without merit because the case at bar involves a collateral attack, whereas the cited case involved a direct appeal in which the entire record was before the appellate court and in which, of course, the presumptions and the binding effect of recitations in the judgment itself which are applicable where the attack is collateral, did not obtain.

There was no proof that the affidavit relied on by Petitioners was in fact the affidavit upon which the citation was issued, nor was there any proof that no other affidavit was filed. The present county clerk of Scurry County testified that there might have been other papers filed in the case (R. 238, 239). The Petitioners did not produce the file docket or any other instrument or testimony to show that no other pleading or affidavit was filed in the case. Petitioner Jordan testified that prior to his desertion of his family and his departure from the State of Texas in October, 1912, he made an arrangement with his father, J. B. Jordan, to look after his affairs and his land (R. 246). It so happens that the father was made a party to the suit and was present in person upon the trial of the case and

employed attorneys to defend the same. It is not beyond the realm of reason to assume that the attorneys employed by the father would have and did assert any and every defense which was possible to the cause of action being asserted by Head and to the jurisdiction of the court over the property which had been levied upon and seized by the process of the court. This assumption is substantiated by the findings in the judgment, not only in the formal recitations but also the express finding "that all parties are duly and legally cited therein to appear and answer the plaintiff's petition" (R. 70).

Anyone familiar with the practice of the courts of Texas knows that the court papers are open to the inspection of any one at any time and that there is no requirement that such papers must remain in the custody of the clerk at all times; in fact, they are withdrawn from the court and the clerk's possession freely and without order of the court or without any record of such withdrawal being made. The Supreme Court took cognizance of a similar situation in the *Lessees of Robert Grignon, et al. v. John J. Astor, et al.*, 2 How. 319, 11 L. Ed. 282 at 291.

In the case of *Mendlovitz v. Samuels Shoe Co.*, 5 S. W. (2d) 559 at 560 the court says:

> "If solemn judgments, foreign or domestic, may be attacked, except upon abundant and satisfactory evidence, their force and validity would be very much weakened."

(3) There is no conflict with the case of *Stuart v. Anderson*, 8 S.W. 295. In that case the attack was

collateral but the question involved related to the effect of the filing by the plaintiff in the original suit of an amended petition setting up an entirely new cause of action after the attachment and citation by publication was issued on an original petition. Because of the entire change in the cause of action, the court held that the attachment was levied for the enforcement of the cause of action asserted in the original petition and "*no attachment was levied to secure and enforce the payment of the claims thus made a cause of action* (as asserted in the amended petition)." The holding of the court to the effect that a judgment rendered by default upon such amended petition was void, was based upon a statute then in force but which was not in force at the time the judgments here in question were rendered. The question did not involve, as does the case at bar, the question of the *mere irregularity* of an affidavit upon which the citation may have issued. In the case at bar there is no question but what a proper citation (as well as writ of attachment) was in fact issued and duly published.

(4) In *American Surety Co. v. S. L. & S. Co.*, 180 S.W. 101, there was involved a direct appeal in which the question was whether or not the defendant in an attachment suit had subjected himself personally to the jurisdiction of the court by giving a replevy bond to the sheriff who had attached the property in question. There had been no citation of any kind and no other appearance. The court held that the giving of this bond did not constitute an appearance in the case generally and that citation was required upon the defendant. Since the attack was direct, the holding in

this case is not in conflict with the holding in *Cooper v. Reynolds*, 77 U. S. 308, and *Stephenson v. Kirtley*, 269 U. S. 136. It appeared in each of the latter two cases that the laws of Tennessee and West Virginia, respectively, required citation by publication, even in instances where the court had seized the res by attachment or otherwise; but notwithstanding such state statutory requirements, the Supreme Court in such two cases held that upon *collateral attack defects or irregularities with respect to the issuance of such citation would not permit the holding that the prior judgment was void.*

II. THE SUIT INVOLVING THE 200 ACRE TRACT AND THE COLLATERAL ATTACK ON THE DIVORCE DECREE AND THE JUDGMENT OF 1928.

There Is No Basis For Invoking Jurisdiction of the Supreme Court.

1. THE COLLATERAL ATTACK ON THE JUDGMENT OF 1928.

We are taking up the 1928 Judgment first because it will avail Petitioners nothing unless they can successfully attack both this judgment as well as the Divorce Decree. The holding of the Circuit Court of Appeals with respect to the suit relating to the 200 acre tract is not only amply supported by and in accordance with the decisions of the courts of Texas, but also with the universally recognized rule to the effect that upon a collateral attack, where the judgment is perfectly regular upon its face as was this judgment

(R. 146), any defects in said judgment with respect to the sufficiency of the pleadings or the correctness of the court's adjudication of the facts in issue or of its interpretation of the principles of law applicable thereto, cannot be inquired into. A judgment rendered upon a petition, even though such petition be subject to general demurrer, is still not a void judgment because the court rendering a judgment necessarily adjudged in the first instance that the petition was sufficient, and its adjudication of such an issue, even though subject to reversal on appeal, is not subject to review in a collateral attack. This is particularly true in this case where potential jurisdiction of the subject matter is conceded and jurisdiction over the person of the defendant is not in question.

Weems v. Masterson, 80 Texas 45, 15 S.W. 590;

Sederholm v. City of Port Arthur, 3 S.W. (2d) 925 (C.C.A.), affirmed by the Commission of Appeals in 13 S.W. (2d) 685;

Gibbens v. Bourland, 145 S.W. 274;

Hart v. Hunter, 114 S.W. 882 (error refused);

Bearden v. Texas Co., 41 S.W. (2d) 447;

Schaeffer v. Williams, 208 S.W. 220 (error refused);

Gulf T. & W. Ry. Co. v. Lunn, 141 S.W. 538, affirmed by the Supreme Court in 106 Texas 511, 171 S.W. 1121;

Tanton v. State National Bank of El Paso, 43 S.W. (2d) 957, affirmed by the Supreme Court 79 S.W. 833;

Freeman on Judgments (5th Edition), sec. 365.

In *Weems v. Masterson*, supra, Judge Stayton of the Texas Supreme Court stated:

> "A proposition that a judgment of a district court could be attacked in a collateral proceeding because pleadings were defective, if the court had jurisdiction of the subject-matter and the parties, would not be advanced, and it would be readily conceded that, however erroneous such a judgment might be, it would be conclusive on the parties until set aside by some direct proceeding for that purpose; and we are of opinion that this would be true even if the pleadings were so defective as to be bad on general demurrer, as to present no issue of fact."

In *Tanton v. State National Bank of El Paso*, supra, there was involved a collateral attack upon a prior judgment, based upon a petition which was held to be subject to a general demurrer. Notwithstanding this fact the judgment was upheld.

In this respect the Court stated:

> "The facts alleged in the petition were insufficient to show a lien upon the land, and this feature of the petition was subject to general demurrer. But this does not subject the judgment to collateral impeachment unless the deficiency is one which affects the jurisdiction of the court and deprives it of jurisdiction. I. Freeman on Judgments (5th Ed.), Sec. 365; 1 Black on Judgments (1st Ed.), Sec. 269, 34 C. J. p. 554, Sec. 852 and p. 560, Sec. 860; Holmes v. Buckner, 67 Tex. 107, 2 S.W. 452; Moore v. Perry, 13 Tex. Civ. App. 204, 35 S.W. 838; Pearson v. Lloyd (Tex. Civ. App.), 214 S. W. 759; Hart v. Hunter, 52 Tex. Civ. App. 75, 114 S. W. 882.

"This matter is discussed at some length by Judge Freeman at Section 365, from which these excerpts are taken:

" 'For jurisdiction does not depend upon the sufficiency or fullness of the statement of the cause of action pleaded, nor is it of any importance collaterally whether the pleading does or does not state a cause of action, providing it sets forth a case within the court's powers. If a cause is pleaded belonging to a general class over which the court's authority extends, then jurisdiction attaches and the court has the power to determine whether the pleading is good or bad, and to decide upon its sufficiency as a statement of a cause of action. * * *

" 'It would be difficult to imagine a case in which a court having jurisdiction in other respects could not render a judgment free from collateral attack, because of defects in or insufficiency of the pleading. * * * A pleading which is adequate in bringing the subject matter before the court may be faulty in many respects, even in its averments of material elements of the cause, and yet sustain the judgment against impeachment.' "

Chief Justice Cureton of the Supreme Court of Texas on March 13, 1935, (79 S.W. (2d) 833) in affirming the aforementioned case, stated:

"Without discussing the matter further, it is sufficient, we think, to here state that we concur in the opinion of the Court of Civil Appeals in this case, and, accordingly, affirm the judgment of that court."

The title of Ethel Hall as asserted and adjudicated

in the 1928 suit in the District Court of Yoakum County, is valid, because the 1916 judgment whether void or valid, together with adverse possession under it, was constructive notice to Jordan of the adverse nature of her claim. The trial court's decision in the case at bar seems to have been based in part upon an erroneous conception of the rules applicable to the right of one co-tenant to acquire limitation title as against another.

Of course, the general rule is that since each co-tenant is entitled to possession, notice of adverse possession by one co-tenant must be brought home to the other co-tenant in some manner other than relying upon the presumption of notice from the very fact of possession. But such notice may be either actual or constructive. Applying this rule to the case at bar, our first proposition is that the state court having passed upon the subject it is conclusively presumed that its finding was based upon evidence, and even if the rule required actual notice, the presumption would still obtain that the evidence showed actual notice. There is no affirmative showing that actual notice of the adverse nature of the plaintiffs' claim was not timely brought home to Jordan.

In the second place, under the law of Texas actual notice of the adverse nature of Ethel Hall's possession of the property was not necessary, and the fact of the rendition and recordation of the 1916 judgment and the notoriety and publicity incident thereto through the publication on four different occasions of the citation setting out her claim to the property was a notorious and overt act, regardless of the validity of the

judgment as a judgment, which conclusively constituted constructive notice;

Honea v. Arledge, 120 S.W. 508 (W. Ref.);
Production Company v. Lee, 132 Tex. 254, 121 S.W. (2d) 973;
Moore v. Knight, 127 Tex. 610, 94 S.W. (2d) 1137;
Jones v. Siler, 129 Tex. 18, 100 S.W. (2d) 352;
The Lessee of Clymer v. Dawkins, 3 How. 674, 11 L. Ed. 778 at 785.

Therefore, the only way that the limitation title of Ethel Hall was dependent upon the prior 1916 judgment was, first, as a written memorandum showing her claim to extend to a tract of more than 160 acres, and, second, for the purpose of showing constructive notice to Jordan of the adverse nature of her subsequent possession, *and in both respects it is absolutely immaterial whether such judgment be void or valid.* It would and did serve either purpose to the full and complete measure of the law, even though void as a judgment, to the same extent as if it had been valid. Of course, if it be valid the 1928 judgment would merely be carrying "coals to Newcastle."

The finding that no statement of the evidence was filed in this case is not supported by the record, but in any event its absence would not render the judgment void. The present clerk of the court rendering the 1928 judgment testified that there might have been a statement of facts filed in the case in 1928 (R. 190). The Petitioners did not produce in court any file docket or other record purporting to list all of the pa-

pers filed in the case. There was no affirmative showing that no statement of the evidence was filed except the testimony of the clerk that some twelve years later he was not able to find the same among the papers in the case. Even if no statement of the evidence was filed, the failure to do so would not render the judgment void and subject to a collateral attack;

Tex. Jur. Vol. 25, p. 412;
McLane v. Kirby & Smith, 116 S.W. 118;
Hayward v. Hayward, 53 S.W. (2d) 108;
Abramson v. Sullivan, 103 S.W. (2d) 229.

2. THE COLLATERAL ATTACK UPON THE DIVORCE DECREE.

There has been for years and still is much confusion in decisions of the State of Texas as to the meaning, construction and effect of the provision of the last sentence of this statute when the question was presented to the appellate courts upon appeal for direct review, *but all the decisions of Texas without exception, so far as we have been able to find, are to the effect that a judgment rendered in a divorce case which does divest one of the parties of the title to real estate is not void.* We shall presently review the authorities where the question has been presented in a collateral attack, but before doing so we call the attention of the Court to a number of cases in which the question has been raised on appeal or on a direct attack. One of the earliest, if not the earliest case, in which the interpretation of this statute came before the Texas Supreme Court was in *Fitts v. Fitts*, 14 Tex. 443. There the Court held

that the limitation in the statute applied to a separate property and not to community property.

In *Simons v. Simons*, 23 Tex. 344, the Court said that the statute taken as a whole vested in the District Courts power to exercise within reasonable limits a discretion in making partition of property between the parties.

In *Trimble v. Trimble*, 15 Tex. 19, the Court said, in granting a divorce, "The court may make such division at least of the community property, in reference to the condition of the parties and the support and education of the children as may be equitable and just."

In a number of cases, such as *Tiemann v. Tiemann*, 34 Tex. 523; *Long v. Long*, 69 SW. 428; *Aucutt v. Aucutt*, 63 S.W. (2d) 755; *Reasonover v. Reasonover*, 59 S.W. (2d) 887, and others, a judgment in which a divorce case was appealed, and the action of the lower court in divesting one of the spouses of title to real estate, whether separate or community, was reversed. However, the Texas appellate courts have recognized that the court can properly order the community property sold and thus divest title, and then divide the proceeds. This clearly *divests title;*

Smith v. Smith, 91 S.W. 815;
Ciulla v. Ciulla, 253 S.W. 643;
Young v. Young, 23 S.W. 83.

The Supreme Court of Texas in the case of *Hedtke v. Hedtke*, 248 S. W. 21, said at page 23:

> "The present statute is essentially the same as the act of 1841, with the elimination of the provi-

sion relative to slaves, and with the correction of manifest typographical errors. Its language ought to be given the meaning uniformly ascribed to it by this court, and that is, that the court pronouncing a decree of divorce is invested with wide discretion in disposing of any and all property of the parties, separate or community, and that its action, in the exercise of such discretion, should be corrected on appeal only where an abuse of discretion is shown in that the disposition made of some property is manifestly unjust and unfair. Simons v. Simons, 23 Tex. 348; Rice v. Rice, 21 Tex. 68; Gulley v. Gulley, 111 Tex. 238, 231 S.W. 97, 15 A.L.R. 564."

In the case of *Scannell v. Scannell*, 117 S.W. (2d) 538, at pages 543-544, the Fort Worth Court of Civil Appeals said:

"Our statutes confer upon the trial court a wide discretion in both matters of divorce and a division of the community property. Articles 4632 and 4638, R.C.S. * * *

"The discretion given to the trial court is not confined to the matter of grounds for divorce, but is extended to an equitable division of the property; the wisdom of this provision of law has seldom been criticised. The appellate courts may not revise that discretion in the absence of a clear abuse by the trial court. * * *"

Scott v. Fort Worth National Bank, 125 S.W. (2d) 356, by the Fort Worth Court of Civil Appeals, contains the following statement at page 364:

"Under the authorities cited, we hold that the district court had power and jurisdiction in 1929

> to enter judgment for divorce, award custody of the minor and, in the same proceeding, make such division of the property deemed by him to be just and fair between the parties and to their child. He could have at that time awarded to the non-offending wife a *lump sum in property for the maintenance of the child.* * * *"

In the case at bar it appeared from plaintiff's pleading in the 1916 case that the defendant had abandoned her, and had not since his abandonment contributed anything to the support of the three minor children. It was his duty as their father to support them even after the divorce, and even after the permanent custody of the children had been awarded to their mother. Unquestionably it was the court's duty to make provision for their care and support. Under such circumstances the aforementioned statute did not prevent the court from awarding this tract of land to the mother.

In any event plaintiff's petition asked for a recovery of this tract of land. It presented a controversy within the jurisdiction of the district court. It was that court's duty to pass upon and decide the issues. The defendant was properly before the court, and that court, whether right or wrong, decided the question and awarded the title to the wife. Under the authorities cited, that decision is binding in a collateral attack.

Texas Courts Hold Divorce Judgment "Divesting" Title Not Void.

Under the authority of *Erie Railway Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196, as well as under the statutory rule requiring federal courts to give full faith and credit and like effect to the judgments of the various state courts, the judgment of the District Court of Scurry County, whether rightfully interpreting and construing said statute or not, should not be held a void judgment because under the uniform decision of the courts of Texas identical judgments placing identical construction upon the statute have been upheld every time one of such judgments has been subjected to a collateral attack.

Askew v. Rountree, 120 S.W. (2d) 117 (W. dis.);

Bird v. Palmetto Lumber Company, 176 S.W. 610.

In *Bird v. Palmetto Lumber Co.*, supra, the Court upheld the prior divorce judgment when collaterally attacked and stated in part as follows:

> "The proper rule in such a case as the one under consideration is aptly stated by Mr. Freeman in his work on Judgments, Sec. 135, as follows:
>
> " 'Jurisdiction being obtained over the person and over the subject-matter, no error or irregularity in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Error of decision may be corrected, but

not so as to reach those who in good faith relied upon its correctness.'

"The court trying the cause of Bean v. Bean had jurisdiction over the parties and of the subject-matter of that suit. * *

"Such judgment is not void. * * *"

As pointed out by the Court in the Askew case above, every presumption necessary will be made in support of the court rendering the judgment being attacked.

In the case at bar this record shows that the husband, H. C. Jordan, deliberately abandoned his wife and children without making any provision for their support. At the time of the abandonment the family was living on this 200 acres. It is not unreasonable to assume that Jordan had agreed for the wife to have this property or even had made some character of conveyance to her of it. He was back in Texas for three or four years after the judgment was rendered, and made no complaint at that time about the judgment, although he knew of its rendition (R. 249). He testified that he was working in Arizona and California during the time between 1912 and the time of the judgment. He made no attempt to account for his earnings during that time, which, of course, were community property and half of which belonged to the wife.

The record shows that the wife sold this property to the plaintiff Fisher in 1931, and still the husband made no effort to attack the divorce judgment, but in 1937 did write his wife a letter, stating in fact that he had heard about the oil development, and that as soon as the time was ripe he was going to take some action

(R. 267). The record further shows that at the time of the abandonment there was considerable other property constituting a part of the community property, not only the 120 acres involved in the companion case hereto, but also the West half of Section 800. There may have been considerable other community property. The record is silent with respect thereto. It may be that the evidence before the District Court of Scurry County showed that Jordan had appropriated to his own use other parts of the community property. He may have taken off with him money or other effects constituting a part of the community, and if so, it was certainly within the court's power to adjust the matter by awarding the 200 acres to the wife. In any event the court having exercised its jurisdiction and decided the issue, it does not lie within the power of another court more than twenty years later to go behind the judgment and disregard it as a nullity.

III. RESPONDENTS WERE BONA FIDE PURCHASERS FOR VALUE AND ENTITLED TO PROTECTION AS SUCH UNDER THE LAW OF TEXAS, AND THIS RULE SHOULD BE APPLIED REGARDLESS OF THE HOLDING WITH RESPECT TO THE THREE PRIOR STATE COURT JUDGMENTS COLLATERALLY ATTACKED.

The rule is universally recognized in Texas that a bona fide purchaser for value of land at a judicial sale under a judgment valid on its face and containing recitations in the judgment itself showing jurisdiction will

be protected even in instances where the judgment is absolutely void for want of jurisdiction.

Carpenter v. Anderson, 77 S.W. 291 (writ of error denied);
Dean v. Dean, 165 S.W. 90;
Crow v. Van Ness, 232 S.W. 539;
Williams v. Young, 90 S. W. 940;
Yount v. Fagin, 244 S.W. 1036;
Snell v. Knowles, 87 S.W. (2d) 871.

The evidence amply and without contradiction shows that the Respondents, Fisher, Law and Honolulu, all acquired their titles for a valuable consideration and without notice of any of the alleged defects in any of the three judgments under attack. Although the burden was unquestionably upon Petitioners to allege and prove that the Respondents were not innocent purchases for value *(Cities Service Oil Company v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196), not only did they fail to discharge such burden, but on the other hand the record affirmatively showed that Respondents, and each of them, were bona fide purchasers for value without notice.

J. J. Kelley testified without contradiction that he, as an employee and as land man for the Honolulu Oil Corporation, had purchased the lease upon the 120 acres in question in 1935, and after an examination of the records of Yoakum County, Texas, where the land was situated and without any knowledge whatsoever of any claim to such land by H. C. Jordan (R.278). The evidence also showed that the consideration of $1.00 per acre paid for such lease was a reasonable

price and the customary price being paid for such leases at the time (R.259-260).

The record shows that G. V. Fisher purchased the 120 acres from Mrs. Ethel Hall in 1927 (R.116), paying therefor $600, and assuming a debt due the State of Texas in the sum of $6.51 per acre, together with accrued interest. Fisher testified that the first information he had about any possible claim of H. C. Jordan was in 1937, more than ten years after he had purchased the land, when Mrs. Hall showed him a letter from her former husband, H. C. Jordan, saying "He was watching the situation in Yoakum County to the effect that when it was ripe that he expected to do something about it, securing what was rightfully due him" (R.267). That the amount paid by Fisher was entirely reasonable, is reflected by the testimony showing his grantor's efforts and inability to otherwise sell the land (R.274). No question was raised about the adequacy of such consideration.

The record showed that plaintiff Fisher purchased the 200 acres from Mrs. Ethel Hall by deed dated February 26, 1931, (R. 153) which was corrected by a subsequent deed of March 19, 1931 (R. 156). The record further showed that on July 27, 1926, Fisher had loaned to Mrs. Hall $500.00, and had taken as security for such loan a deed of trust upon the land in question (R. 207). At the time such deed of trust was taken Mrs. Hall had moved from this land to Abilene in Taylor County, Texas, and had established a homestead there in lieu of any homestead claim in this land, so that said lien was valid.

After the original loan Fisher had advanced other sums for interest on the state indebtedness against the land, taxes, etc. (R. 273). The land was conveyed to him by Mrs. Hall in cancellation of all of this indebtedness, which was secured by the aforementioned deed of trust. It not only secured the original $500.00 note but also subsequent advancements. (R. 208). Fisher's testimony to the effect that at the time he made such advances and at the time he took the deed from Mrs. Hall he had no notice whatsoever of the claims of her former husband, Jordan, was uncontradicted (R. 266, 271-273). Fisher, having a lien upon the property which he acquired in good faith and without notice, was entitled to protection as an innocent purchaser for value when he took title to the property in satisfaction of his lien and claim, to the same extent as if he had paid a new consideration at the time. The theory of "antecedent debt" does not apply under such circumstances. Furthermore, Fisher released the lien securing said indebtedness, which is now barred by limitation (R. 213). The authorities holding that an antecedent debt will not support a claim of innocent purchaser for value or based upon the fundamental concept that the purchaser, even though not protected, is thus left with his debt and his position has not changed. Where, however, a purchaser has surrendered security or has released an antecedent obligation and such obligation has become barred, the reason for the rule does not exist and the rule therefore does not apply.

66 Corpus Juris, page 1107, Section 931;
43 Texas Jurisprudence, page 636;
Tobin v. Benson, 152 S.W. 642;

Red River National Bank v. Latimer, 110 S.W. (2d) 232;
27 R. C. L., page 699;
Dunlap v. Green, 60 Fed. 242 (5th Circuit).

The question of innocent purchasers was not considered by the Circuit Court because of its holding with respect to the collateral attack on the judgments themselves, but under the holding of this Court in *Erie Railway Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Cities Service Oil Company v. Dunlap*, supra, the judgment of the trial court should have been reversed in favor of Respondents regardless of such holding. Respondents, therefore, urge this proposition in opposition to the granting of the writ of certiorari herein.

IV. PETITIONERS HAD RATIFIED THE LEASE TO HONOLULU AND ALSO THE TITLE OF FISHER WITH RESPECT TO THE 200 ACRE TRACT.

The record shows that by royalty deed dated January 28, 1939, filed for record on February 2, 1939, at 5:30 o'clock p. m., and recorded in Volume 53, page 301, Deed Records, Yoakum County, Texas, G. V. Fisher sold and conveyed to Ross Walker et al. an undivided one-tenth of the royalty in the 200 acres in question, such deed reciting as follows:

> "Said lands, or portions thereof, being now under oil and gas lease executed in favor of Honolulu Oil Corporation it is understood and agreed that this sale is made subject to the terms of said lease,

but covers and includes one-tenth of all the oil royalty, and gas royalty, and casinghead gas and gasoline royalty, and royalty from other minerals or products, due and to be paid under the terms of said leases."

Before said royalty deed was executed on January 28, 1939, Ross Walker on stationery of Lawrence L. Barber, one of the attorneys in the case at bar, wrote G. V. Fisher a letter dated January 26, 1939, enclosing said royalty deed for execution by the said G. V. Fisher, and stating that "I had my attorney to examine the abstract and he finds the title in you is all right without objections" (R. 262).

On the same day, hour and minute there was also filed for record a quit claim deed from H. C. Jordan to Ross Walker, dated February 1, 1939, reciting that it conveys "all of my undivided one-fourth interest in the aforementioned 200-acre tract of land" (R. 173). In this connection, it is important to note that Walker testified that he obtained this quit claim deed from Jordan in consideration of his agreement to finance a lawsuit to establish Jordan's claim to title (R. 301). Walker testified that Jordan came to him and made that proposition. However, it is significant to note that Walker began inquiring into the title in connection with his purchase of the royalty interest, and thereafter got this quit claim deed from Jordan.

The provisions contained in the royalty deed, the circumstances attending its execution, delivery and acceptance and the letter from Walker to Fisher constitute an acknowledgment and recognition of the title of Respondents. The deed itself expressly recognizes

Honolulu's lease and the letter expressly recognizes Fisher's title.

The courts of Texas go very far in favor of construing, if possible, the words of a royalty deed as constituting a binding ratification of an oil and gas lease therein referred to.

Turner v. Hunt, 116 S.W. (2d) 688 (Com. App.);
Grissom v. Anderson, 79 S.W. (2d) 619 (Tex. Sup. Ct.);
Humble Oil & Refining Company v. Clark, 87 S.W. (2d) 471 (Com. App.);
Van Deventer v. Gulf Production Company, 41 S.W. (2d) 1029 (writ refused);
T. P. Coal & Oil Company v. Kirtley, 288 S.W. 619 (error refused);
Mitchell v. Simms, 63 S.W. (2d) 371.

The law of Texas is well settled that one co-tenant may convey the entire property, which conveyance will be binding upon the other co-tenants if they ratify and adopt it. Such ratification and acquiescence may be evidenced by any acts indicating an intention to adopt the lease and recognize its validity as distinguished from intention to repudiate.

This contention was likewise not passed upon by the Circuit Court of Appeals, but is nevertheless urged by Respondents in opposition to the granting of the writ of certiorari.

In conclusion Respondents show to the Court that for more than twenty-five years after the Petitioner Jordan had abandoned his wife and family and left the State of Texas, the title to these two tracts of land has been regular and unquestioned and unclouded until the filing of the quit claim deed hereinabove mentioned as between the two Petitioners. Neither this nor any other court should sanction a collateral attack upon state court judgments regular upon their face and which, for such period of time, have not been directly questioned.

Petitioners assert to this Court that the holding of the Circuit Court of Appeals is in conflict with the decisions of the Texas courts. As a matter of fact, since this case was tried another suit has been instituted and tried in the state courts involving another tract of land and between one of the petitioners, H. C. Jordan, and the TP Coal & Oil Company. That suit is an unreported case, being No. 450 in the District Court of Yoakum County. It involved another tract of land which was also, along with the 120 acres here in question, involved in the Attachment Judgment. The Yoakum County District Court rendered a judgment upholding the Attachment Judgment and denying H. C. Jordan's collateral attack thereon. This decision of the Yoakum County District Court, occurring as it did after the trial of this case, is not contained in this record, and it may be that this Court cannot properly consider such judgment; but as an authority of a State District Court and as evidence of the fact that a decision in this case is not in conflict with the holding of the Texas courts, we called this matter to the Cir-

cuit Court's attention in the briefs there filed and our statement with respect thereto was not challenged. In any event the facts in this record are sufficient for us to assume that the Texas courts have and did reach a similar result as that reached by the Circuit Court.

Respondents respectfully pray that the petition for writ of certiorari herein be denied, and for such other relief as they may be entitled to.

Respectfully submitted,

FRANK STUBBEMAN,
Midland, Texas,
WARREN SCARBOROUGH,
Fort Worth, Texas,
ALFRED MCKNIGHT,
Fort Worth, Texas,
Attorneys for Respondents.

.....
Signature of Counsel.

Of Counsel:
Stubbeman, McRae and Sealy,
Midland, Texas.
Cantey, Hanger, McMahon, McKnight & Johnson,
Fort Worth, Texas.